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CITATIONS

684673—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 605

JACOB SIEGEL COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The findings, conclusions and order of the Federal Trade Commission (R. 646–656) are reported at 36 F. T. C. 563. The opinion of the Circuit Court of Appeals (R. 883–892) and its *per curiam* affirmance on rehearing (R. 905) are reported at 150 F. 2d 751.

JURISDICTION

The decree of the Circuit Court of Appeals was entered November 30, 1944 (R. 893); its final decree on rehearing was entered October 9, 1945 (R. 907–908). The petition for writ of certiorari

was filed November 15, 1945, and was granted January 2, 1946 (R. 911). The jurisdiction of this Court rests on Section 5 of the Federal Trade Commission Act as amended, 52 Stat. 111, 15 U. S. C. 45, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS INVOLVED

1. Whether the court below correctly held that a discretionary determination by the Federal Trade Commission of the remedy to be embodied in a cease-and-desist order directed against an unfair method of competition and unfair acts and practices in interstate commerce is binding upon the courts in the absence of abuse of discretion.

2. Whether the Commission, having determined that the use of the word "Alpacuna" was misleading and deceptive as applied to coats made of a fabric containing alpaca but not vicuna, abused its discretion by forbidding further use of the word with respect to such coats.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, as amended by the Act of March 21, 1938, c. 49, 52 Stat. 111, 15 U. S. C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, * * * * * * * Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed * * *. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. * * *

STATEMENT

The Federal Trade Commission, after hearing on complaints[1] which it had issued against

[1] The Commission's original complaint of May 6, 1938, was followed by a first amended complaint of November 5, 1938, to which answer was made and on which a hearing proceeded. During the course of the hearing, the Commission entered its order directing that the amended complaint be amended to conform to the evidence previously taken and that such evidence be adopted in connection with the second amended complaint (R. 274–276).

respondent under Section 5 of the Federal Trade Commission Act, made findings of fact (R. 646–653) which may be summarized as follows:

Petitioner, a Pennsylvania corporation with its principal place of business in Philadelphia, manufactures, and sells and distributes in interstate commerce in competition with others, overcoats and topcoats which it designates as "Alpacuna" coats (R. 647–648). The overcoats consist of a face or pile which is composed of 50% alpaca, 20% mohair and 30% wool, and the fibers making up this face are worked into a cotton backing (R. 648). The face comprises about 70% and the backing about 30% of the entire fabric (*ibid.*) and, since the coats are fully lined, a prospective purchaser has little or no opportunity to observe the cotton backing (R. 651). Petitioner also makes and sells an "Alpacuna" topcoat made of essentially the same materials as the face of the overcoating fabric, but without any cotton backing and with very little lining (R. 649).

Petitioner's coats are sold to the public through retail dealers to whom it furnishes in the course of its business suggested advertising copy which has been frequently used, and books containing samples of its fabrics which have been frequently displayed to the purchasing public (R. 649–650). Such copy and books have contained representa-

tions that "Alpacuna" fabric is made from alpaca obtained from the South American Andes, angora obtained from Turkestan or elsewhere in Asia, guanaco obtained from Peru, and wool from Texas sheep (R. 649–650). Guanaco is not used and the Angora goat hair or mohair is not imported from Turkestan or elsewhere, but is obtained from Texas goats (*ibid.*).

The name "Alpacuna" is deceptive and misleading to a substantial portion of the purchasing public because it induces the erroneous belief that the coats contain fiber obtained from the animal known as the vicuna (R. 652).[2] It also has the tendency and capacity to mislead and deceive a substantial portion of the public with respect to the fiber content of petitioner's coats (R. 653).

On the findings so summarized the Commission concluded that the acts and practices of petitioner constituted unfair methods of competition and unfair and deceptive acts and practices in interstate commerce (R. 653), and issued its order that petitioner cease and desist from the acts specified

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[2] There was undisputed testimony that vicuna enjoys a reputation as one of the finest fleeces (R. 24, 34, 67), that its presence in a coat would lend additional value to it (R. 34). It is, however, extremely rare, and coats made of vicuna sell at prices ranging between $600 and $900 (R. 33–34, 69). Petitioner's coats sold at retail for between $30 and $45 (Comm. Exs. 71, 76, 78; R. 864, 867, 870).

in six subparagraphs of its order (R. 654–655).[3] Petitioner, seeking review of the Commission's order in the court below, challenged only so much of the order, contained in subparagraph 6, as prohibited the use of the name "Alpacuna" in designating or describing its coats (R. 657).

The court below held that the Commission's findings respecting the use of "Alpacuna" were supported by substantial evidence (R. 889) and that the prohibition of use of the word was not an abuse of the discretion as to remedy vested in the

[3] The Commission ordered petitioner to cease and desist from:

1. Representing that respondent's coats contain guanaco hair.

2. Representing that the Angora goat hair or mohair used in respondent's coats is imported from Turkestan or any other foreign country.

3. Representing through the use of drawings or pictorial representations, or in any other manner, that respondent's coats contain fibers or materials which they do not in fact contain.

4. Representing that coats made of fabrics which have a cotton backing are composed entirely of wool or of wool and hair.

5. Using any advertising matter or causing, aiding, encouraging, or promoting the use by dealers of any advertising matter which purports to disclose the constituent fibers or materials of coats composed in part of cotton, unless such advertising matter clearly discloses such cotton content along with such other fibers or materials.

6. Using the word "Alpacuna," or any other word which in whole or in part is indicative of the word "vicuna," to designate or describe respondent's coats; or otherwise representing, directly or by implication, that respondent's coats contain vicuna fiber.

Commission (R. 887–889). The court stated, however, that it thought the prohibition "far too harsh" and that it would modify the order to permit use of the word with "qualifying language" if the "control of the remedy" which it considered it possessed under the decision of this Court in *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, had not been limited by subsequent decisions of this Court, involving other administrative tribunals, vesting discretion as to remedy in the administrative agency (R. 889–892).

Upon rehearing restricted to possible modification of the Commission's order (R. 904), petitioner displayed labels which added the words "contains no vicuna" following the word "Alpacuna" and sought modification to permit continued use of the name in this manner. The court, refusing the suggested modification, adhered to and confirmed its original decision (R. 905).

SUMMARY OF ARGUMENT

The Commission, having found upon sufficient evidence that the use of "Alpacuna" is misleading and deceptive, has discretionary authority to determine the remedy; and the remedy selected will be modified or eliminated on review only if the determination is so unwarranted as to constitute an abuse of discretion, as this Court held

in its latest decision with regard to the remedial feature of an order of the Commission, *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67. Such has been the consistent view of the circuit courts of appeals in recent cases involving Federal Trade Commission orders directed against deceptive firm names and product designations; and the same principle has been followed with respect to judicial review of the discretionary determinations of other administrative agencies. There is no question here of relationship of the order to the evil to be prevented, since the order deals with the exact violation of the statute found to have been committed.

The Commission did not abuse its discretion by prohibiting the use of the word "Alpacuna", since no lesser remedy would adequately cure the deception. A contradiction, "Contains no vicuna", of a portion of the meaning the term conveys, would introduce new ambiguities into its use and would not eliminate the danger which arises from placing in the hands of dealers the means of deceiving the public. Petitioner's contention that the Commission cannot validly prescribe a remedy without substantial evidence of the inadequacy of milder remedies, and that there was no such evidence here, misconceives the nature of the administrative determination and would give rise to insoluble procedural problems.

ARGUMENT

I

THE ORDER OF THE FEDERAL TRADE COMMISSION AS TO THE REMEDY IS BINDING UPON THE COURTS IN THE ABSENCE OF ABUSE OF DISCRETION

Petitioner does not question the sufficiency of the evidence to support the Federal Trade Commission's finding (R. 652) that "the name 'Alpacuna' is misleading and deceptive to a substantial portion of the consuming public." The sole contention is that some means of curing the deception should have been found short of prohibiting the use of the word "Alpacuna", such as the addition of "qualifying words" to the label and to advertisements making use of the name; and it is urged that the Commission's failure to include permission in its order for the continued use of "Alpacuna" if followed by the words "contains no vicuna" to that extent invalidates the order. We submit, however, that the remedy required to correct an unfair method of competition lies distinctly within the discretion of the Commission and that the order in this case is in no sense an abuse of the Commission's authority. It cannot, therefore, be disturbed upon review.

Petitioner suggests (Br. 8) that the decision of the court below is predicated upon the view that a reviewing court is wholly without power to modify an order of the Commission as to the remedy, however broad in scope or unrelated to

the evil to be prevented the prescribed remedy may be. Actually, however, the court below held, not that the courts are powerless, but that the Commission's determination of the remedy to be applied in a given case may be modified by the courts only if it is so unwarranted by the circumstances that it can fairly be said to constitute an abuse of discretion. The court recognized that there was no abuse here despite its view that the Commission's order is harsh; for (R. 892)—

> * * * the discretion as to the remedy in such controversy as this has now been vested in the Federal Trade Commission. That discretion has been exercised to totally prohibit the use of the name "Alpacuna" to the petitioner. Since the Commission has such power, we are unable, in view of the evidence, to say that the power has been abused in this instance, though under the same facts and circumstances, if we were still in control of the remedy, we would modify the order as above indicated.

What petitioner is contending for, in contrast to the basis upon which the court rested its decision, is power in a reviewing court to substitute its judgment for that of the Commission as to the appropriateness of the remedy to be applied. Petitioner buttresses its contention with the proposition (Br. 8–9) that, to support the remedy adopted by the Commission, there must be sub-

stantial evidence that a milder remedy would not suffice. Neither authority nor analysis of the problem supports any such bases of decision. The court below applied the proper test to the Commission's order and reached the correct result.

The most recent case in which this Court has considered modification of the remedy prescribed in an order of the Commission directed at unfair practices is *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67. The Commission there had found that the use of the words "California white pine" to describe products of the *pinus ponderosa*, botanically a yellow pine, was deceptive and an unfair method of competition and entered an order prohibiting use of the word "white" in conjunction with "pine" to describe such products. This Court, in sustaining the order, concluded that "the Commission did not abuse its discretion in reaching the conclusion that no change of the name short of the excision of the word 'white' would give adequate protection". (291 U. S. at 81–82.)

Petitioner has entirely ignored this decision and has relied upon the earlier case of *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212. There the Commission found that many purchasers of flour, including some dealers, believe that the words "milling company" mean a concern engaged in grinding wheat into flour and

also believe that the product of such a concern is more desirable in price or quality than the product of a concern which (as was the case with the respondents there) merely mixes and blends different kinds of flour purchased from others. Because of these findings the Commission entered an order forbidding the use of the words "milling company" or other similar terms in respondents' corporate or trade names. This Court held, however, that the evil found by the Commission would be corrected if the use of qualifying words in immediate connection with the corporate names were required. It directed modification of the order to permit such qualified use, leaving the form and manner of the qualifications to be fixed by the Commission. 288 U. S. at 218.

The *Algoma* case, like the present one, involved the use of a name for a product which tended to mislead purchasers as to the identity of what they were getting. The *Royal Milling Co.* case, on the other hand, involved a misleading aspect of the names under which sellers did business. It does not follow that, because the Commission may have gone too far in the latter case by attempting to deprive merchants of their established names when explanatory statements would inform purchasers of the actual nature of their businesses, it must also permit the continued use of a misleading product designation which would continue to be a means of deceiving the consuming public (see *infra*, p. 21).

The *Algoma* case holds to the contrary and, unlike the *Royal Milling Co.* case, clearly lays down the test which is to be applied in judging the validity of an order of the Commission in this field. The decisions in the *Royal Milling* and *Algoma* cases are attributable, not to the application of different principles, but to factual differences from which it might be concluded that the Commission's determination constituted an abuse of discretion in the one case but not in the other.

There was another important distinguishing circumstance in the *Royal Milling Co.* case. The respondents there had made an offer early in the proceedings before the Commission to place the words "Not Grinders of Wheat" in conspicuous lettering on their letterheads, bags, invoices, etc. 288 U. S. at 215. No such offer was made in the Commission proceedings in the *Algoma* case or in the instant case. One who seeks a limitation of the remedy against use of a misleading name should be required to submit his proposal to the Commission in order that it may exercise its administrative judgment as to the adequacy of the remedy as it would be limited. The proposal comes too late when it is initially put before a reviewing court. Cf. *National Labor Relations Board* v. *Cheney California Lumber Co.*, No. 319, this Term, decided February 25, 1946.

In the recent cases involving Federal Trade Commission orders directed against deceptive firm

names and product designations, the circuit courts of appeals have consistently followed the "abuse of discretion" test laid down in the *Algoma* case with respect to the appropriateness of the remedy. *Perloff* v. *Federal Trade Commission*, 150 F. 2d 757 (C. C. A. 3); *Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission*, 143 F. 2d 676 (C. C. A. 2); *Parke, Austin & Lipscomb, Inc.* v. *Federal Trade Commission*, 142 F. 2d 437 (C. C. A. 2), certiorari denied, 323 U. S. 753; *Herzfeld* v. *Federal Trade Commission*, 140 F. 2d 207 (C. C. A. 2). In all of these cases orders of the Commission which totally forbade the use of specified words as misleading and deceptive were sustained as against the contention that qualifying words would remedy the evil, on the ground that the Commission's orders did not involve abuse of discretion.[4]

In several recent cases cited by petitioner, in which orders of the Commission directed against the use of certain words were modified, the ground of modification was, not that the Commission had

[4] In the order in the *Herzfeld* case, the word "Mills" was prohibited in the corporate title of a dealer in, but nonmanufacturer of, rugs, despite its relations with supplying manufacturers which amounted to rather complete control over their production; in the *Ritz* case, "*Rejuvenescence*" was prohibited as part of the name of cosmetic preparations which the Commission found did not possess rejuvenating qualities; in the *Perloff* case, "Packing" was prohibited in the firm name of distributors, but nonpackers, of meat; in the *Parke* case, "Smithsonian Institution" was forbidden in the corporate title of a private book-distributor enjoying contractual relations with the Smithsonian Institution.

committed reversible error in its determination of the remedy, but that certain of the Commission's findings of fact lacked substantial evidentiary support. In *Gelb* v. *Federal Trade Commission*, 144 F. 2d 580 (C. C. A. 2) a Commission order prohibiting the representation that a hair-oil product "reconditioned" the hair was modified because the court (p. 582) found nothing which could be "regarded as substantial evidence that Clairol is incapable of reconditioning the hair", whereas many witnesses affirmed from experience that it did. In *Lekas & Drivas* v. *Federal Trade Commission*, 145 F. 2d 976 (C. C. A. 2), a Commission order restricting advertising claims in regard to an olive oil was modified to permit advertisement of a "possible slight value as a laxative", the sole witness in the proceeding having testified that there was such an effect from its use. *Ultra-Violet Products* v. *Federal Trade Commission*, 143 F. 2d 814, 816–817 (C. C. A. 9) contains a similar holding.

As the court below recognized by its reliance upon decisions of this Court which involved orders of the National Labor Relations Board, the extent to which a court may interfere in review proceedings with the remedy prescribed in an order of the Federal Trade Commission is determined by the same principles as apply in relation to the orders of other administrative agencies. In the present case, as this Court recently remarked in a

related connection, it is necessary to recall, as did the court below, that the courts "must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted". *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 580–581. Clearly the Federal Trade Commission is the body charged with devising the means of eliminating the unfair methods of competition and the unfair or deceptive acts and practices against which it is directed to proceed. Fully applicable here is the holding of this Court with respect to the National Labor Relations Board, that when the Board finds on the basis of substantial evidence that unfair labor practices have been committed, the determination of appropriate remedies is within the peculiar competence of the Board, so long as it renders an "allowable judgment." *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 543–544; *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702, 704; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194, 198–199; *National Labor Relations Board* v. *Cheney California Lumber Co.*, *supra*.

The same principles have been enunciated with respect to the discretionary features of many types of administrative orders other than cease-and-desist orders. See, e. g., *Northwestern Electric Co.*

v. *Federal Power Commission*, 321 U. S. 119, 124; *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218, 228; *Board of Trade* v. *United States*, 314 U. S. 534, 545–548; *American Power & Light Co.* v. *Securities & Exchange Commission*, 141 F. 2d 606, 619 (C. C. A. 1). In the case at bar, as in these and other instances of judicial review of discretionary administrative action, the issue turns, not upon the wisdom of the administrative determination as the court may view it, but upon the existence of a rational relationship between the purposes of the statute and the remedy prescribed in the order.

The present case does not present any question of reasonable relationship of the provision embodied in the order to the statutory violations found by the Commission, such as was involved in *National Labor Relations Board* v. *Express Publishing Company*, 312 U. S. 426, 432–438, elaborated upon in *May Department Stores Co.* v. *National Labor Relations Board*, No. 39, this Term, pp. 8–13 of slip opinion. Cf. *National Labor Relations Board* v. *Cheney California Lumber Co.*, *supra*. See also *New Haven R. R.* v. *Interstate Commerce Commission*, 200 U. S. 361, 402–405. The order of the Federal Trade Commission indisputably relates to the exact unfair practice, namely, use of the trade name "Alpacuna", which the Commission found to be misleading and deceptive. The order is therefore addressed to the precise violation found to have been committed. There is the closest

possible relationship of remedy to evil, and there consequently is no basis for setting aside or modifying the Commission's order upon the ground that it is couched in unduly broad terms or covers practices not involved in the case.

Nor does the provision of the statute, authorizing a reviewing court to modify as well as to affirm or set aside an order of the Federal Trade Commission, establish a broader scope of judicial review with respect to such orders than would otherwise prevail. It is elementary that any action taken by a court with respect to an order of the Commission must have reference to a feature of the order which lies within the competence of the court to correct. The boundaries of that competence are set by the purposes of the legislation establishing the Commission and by the specific provision of Section 5 of the Act (*supra*, p. 3) with respect to the finality of findings of fact supported by evidence. If the judicial power to modify an order of the Commission were taken literally and without qualification as stated in the statute, there would be no limit to it except as respects the Commission's findings of fact and, consequently, there would be no field within which the Commission's discretionary judgment could operate with finality. Such a result would conflict with the authorities previously cited and with the entire philosophy of judicial review which this Court consistently follows.

II

THE COMMISSION'S ORDER PROHIBITING USE OF THE WORD "ALPACUNA" WAS A PROPER EXERCISE OF ITS DISCRETION TO DETERMINE THE RELIEF NECESSARY TO PREVENT FURTHER VIOLATION OF THE STATUTE

The Commission, on the basis of the testimony given in the course of elaborate hearings, found that the name "Alpacuna" is misleading and deceptive to a substantial portion of the purchasing public "in that it represents or implies to such persons that respondent's coats contain material which they do not in fact contain" (R. 652). There was direct testimony by experts in the trade and members of the public that to them the designation of a fabric as "Alpacuna" implied that the constitutents were alpaca and vicuna, and nothing more.[5] It is, indeed, somewhat difficult to conceive any other implication to any who know, as many do, that alpaca and vicuna are animals whose hair is valuable.[6] Whatever petitioner's intention may have been in coining the term, the Commission's findings as to the capacity of "Alpacuna" to deceive and mislead the public are clearly unassailable, and they are not in fact attacked by the petition.

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[5] E. g., R. 89, 105, 110, 120, 201, 215.

[6] Witness Brown, president of the manufacturers of the material sold by petitioner when asked what the term "Alpacuna" conveyed to him responded: "I would naturally think it was a combination of 'Alpaca' and 'Vicuna.'" And, later: "Q. Can you imagine what else it would come from?" A. "Not with my knowledge of fibers, no." R. 26.

The Commission, with its valid finding before it, was entitled to conclude that nothing short of prohibition of the term "Alpacuna" would give assurance of preventing the deception springing from the use of this name. As several courts have noted, a word which is absolutely false in its connotation "cannot be qualified; it can only be contradicted";[7] and there is a fundamental want of logic in the suggestion that the false assertion of a misleading word is cured by an accompanying contradiction; for, as the *Heusner* case just cited points out (106 F. 2d at 597), customers are simply placed in the position of having to choose at their peril between the false label and an appended correct statement. Moreover, if the contradiction "Contains no vicuna" were believed, the name would still be deceptive; for in that event "Alpacuna" would necessarily imply a fabric composed exclusively of alpaca. Petitioner's coats are not composed of alpaca but of a mixture of animal fibers containing only 50% of alpaca, supplemented in the overcoat by a cotton backing which constitutes 30% of the entire fabric (see *supra*, p. 4). We think this case fully supports the conclusion of a recent commentator that "The addition of a quali-

[7] *Federal Trade Commission* v. *Army & Navy Trading Co.*, 88 F. 2d 776, 779 (App. D. C.); *H. N. Heusner & Son* v. *Federal Trade Commission*, 106 F. 2d 596 (C. C. A. 3); *El Moro Cigar Co.* v. *Federal Trade Commission*, 107 F. 2d 429 (C. C. A. 4).

fying phrase will rarely counteract the evil effects of the deceptive brand or name. If the Commission's orders are to possess any vitality, the restraint must be complete and unqualified . . . in the long run the public interest will be best served if no compromise is made with falsity."[8]

Even if the falsity of petitioner's labels and advertising could be regarded as neutralized by the addition of "contains no vicuna" to the name "Alpacuna", petitioner would still be permitted to place in the hands of its customers, the retailers of its product, without check, an instrument of misleading the public; for, as petitioner's sales manager testified (R. 726), the retailer may determine his own advertising and will, presumably, make such use of the name as he pleases. This Court has recognized that in the case of misleading labels it is an unfair method of competition to put "into the hands of the retailer an unlawful instrument, which enables the retailer to increase his own sales of the dishonest goods, thereby lessening the market for the honest product." *Federal Trade Commission* v. *Winsted Hosiery Company*, 258 U. S. 483, 494. See also *Koolish* v. *Federal Trade Commission*, 129 F. 2d 64, 65 (C. C. A. 7), certiorari denied, 317 U. S. 683, rehearing denied, 317 U. S. 711. For the

[8] Handler, *Unfair Competition and the Federal Trade Commission*, 8 Geo. Wash. L. Rev. 399, 408 (1939).

Commission to attempt to proceed against the retailers of "Alpacuna" who might misuse the name would be obviously impracticable if not beyond the Commission's statutory power to deal with practices arising in interstate commerce.

Petitioner's attempt (Br. 8–9) to fasten upon the Commission the requirement that there must be substantial evidence of the inadequacy of milder remedies in order to sustain the remedial provision contained in a Commission order, must fail in this case for several obvious reasons. Not only is there record evidence to which we have pointed, relating to the deceptiveness of the name "Alpacuna," which sustains the order (cf. *Federal Trade Commission* v. *Raladam Co.*, 316 U. S. 149, 151–152), but the entire contention misconceives the nature of the determination here involved. The remedial provision of an order relates to the future; there cannot be "evidence" in the ordinary sense relating to its operation or to the operation of possible alternatives, but only opinion or analogy or inferences as to tendencies. Factual determinations are not involved in prescribing a remedy, but, rather, decisions with regard to probabilities and the gains and losses residing in alternative courses of action—decisions which are made in the light of facts and which must operate in an established factual setting, to be sure, but decisions primarily of policy—in short, discretionary decisions which lie at the heart of the ad-

ministrative process and are not to be disturbed by courts unless arbitrarily or irrationally made.[9]

Procedurally, moreover, petitioner's contention would give rise to problems defying satisfactory solution. It would inject into a late stage of every proceeding involving a misleading trade name or trade-mark the litigable question whether an explanatory or contradictory statement, rather than outright discontinuance of the falsehood, might not adequately correct the deception. A party, no matter how misleading his trade name or trade-mark was found to be, could after the close of the long administrative process, fall back on a second and distinct line of defense in the courts by offering to use such "qualifying" language as his ingenuity might suggest, and thereby cast upon the Commission the burden of demonstrating that his suggestion would be inadequate to meet the need. Prolongation of the proceedings would result, without compensating benefits; and in the end the question of judgment would remain—a question proper for administrative and not for judicial solution, if our contention is correct.

It should be observed finally, that it is no defense that a misleading trade name was adopted without fraudulent design (*Federal Trade Com-*

[9] Cf. *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), pp. 115–119; Landis, *The Administrative Process* (1938), pp. 146–152.

mission v. *Algoma Lumber Co.*, 291 U. S. 67, 79); or that it has been continuously used for many years (*ibid.*); or that those who are "trained and experienced" are not misled (*Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, 116); or that the name has been registered in the Patent Office as a trade-mark (*Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission*, 143 F. 2d 676, 679 (C. C. A. 2)). Petitioner, therefore, is not aided by the length of time the name "Alpacuna" has been used or by the asserted want of intent to deceive which attended its adoption.

CONCLUSION

For the reasons stated, we respectfully submit that the decree of the Circuit Court of Appeals should be affirmed.

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